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Carter

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

FILE: B-201331.2

DATE: February 1, 1982

MATTER OF: J. L. Associates, Inc.

DIGEST:

1. Agency's admitted erroneous handling of this protest as one filed after award was not prejudicial because the protest is denied.
2. Letter of negotiations which reminded offerors that contract was not to be level-of-effort and which advised all offerors that their proposed manpower appeared to be low compared to the agency's "initial estimate" of staff levels was advisory rather than directory and not misleading. Protester's election to increase staffing, rather than explain how contract could be performed with originally proposed personnel, and resultant downgrading of proposal, was attributable to the protester's failure to accurately assess the options available in responding.
3. Absent evidence that the limited participation of the retired former commanding officer of the procuring activity as a consultant to one offeror undermined the integrity of the competition or resulted in bias, there is no basis to question the consideration of the offeror's proposal.
4. A successor employer is not required by the Service Contract Act of 1965, 41 U.S.C. §§ 351, et seq. (1976), to pay the same levels of compensation as the former incumbent where there is no collective-bargaining agreement and the employees are reclassified to lower paying jobs. Questions concerning the proper classification of employees are for consideration by the Department of Labor.

5. GAO will not consider an allegation that the former incumbent's employees were "raided" because the identification to the awardee by agency personnel of the protester's superior employees occurred after the selection of the new contractor and did not affect the outcome of the procurement.

J. L. Associates, Inc. (JLA), has filed a protest against the award of a contract to Techplan Corporation under a request for proposals (RFP) issued by the Department of the Air Force. The protest is denied in part and dismissed in part.

The Air Force issued the RFP to acquire nonpersonal services for the review, revision and update of the Air Force's Configuration Management Support System data base and certain related publications on a cost-plus-fixed-fee basis. The RFP incorporated a wage determination reflecting the minimum wages to be paid under the Service Contract Act of 1965, as amended, 41 U.S.C. §§ 351, et seq. (1976), to contractor employees occupying various positions. Cost was to be more important than technical factors in making the award decision.

After evaluating the initial proposals, the Air Force sent each of the three offerors a letter describing the deficiencies which the Air Force had found in their proposals. Each of these letters contains two statements, identical in all three letters, which are significant to JLA's protest:

"The manpower shown in your proposal appears to be underestimated compared to the government's initial estimate of the task. The government's overall projected manpower ratio is 2 to 1 analyst over encoder for this effort. The government further feels that 80 percent of the total analysis effort should be accomplished by skilled senior analysts.

"You are reminded this is a request for a nonpersonal services contract."

JLA responded to these comments by increasing its proposed staffing, with a corresponding increase in estimated costs sufficient to make JLA's projected costs higher than Techplan's; Techplan responded to these same comments by providing an explanation of how it intended to fulfill the solicitation's requirements with only slight changes to its originally proposed staff level. (The original staff levels proposed by these two competitors had been very close.) The Air Force found Techplan's explanation convincing, based in part on a review of the qualifications of Techplan's proposed senior staff and Techplan's experience. The contract was awarded to Techplan based on its lower costs.

JLA's protest to our Office challenges the award on several bases: (1) JLA's initial protest to the Air Force was improperly processed as a postaward protest rather than as a preaward protest; (2) the Air Force did not properly review JLA's contention that it was misled into adding personnel and increasing its costs; (3) the Air Force did not properly review JLA's assertion that the selection of Techplan had been improperly influenced by Techplan's use of a retired Air Force officer well known to the Air Force organization making the purchase; (4) the Air Force did not properly review JLA's allegations that Techplan engaged in "wage busting" and that Techplan's proposal involved "defective pricing"; and (5) that the Air Force confirmed JLA's allegation that its employees were "raided" but took no corrective action. We will respond to each of these contentions in turn.

(1) The Air Force concedes that it incorrectly treated JLA's protest as a postaward protest and has taken steps to ensure that the error is not repeated. In view of our resolution of JLA's protest and the fact that JLA was not prejudiced by this error, we see no need to consider the matter further.

(2) The record shows that the Air Force did review JLA's contention that it was misled into adding personnel and reached the same result we do here. Both the solicitation and the negotiation letters to each of the offerors made it clear that this was to be a task-oriented procurement and not a level-of-effort services

Air Force and Techplan indicate that the briefing to which JLA refers concerned Techplan's activities under contracts with other services and organizations in which TAFIG had an interest in the interoperability aspects and point out as well that this briefing occurred long before this procurement.

Initially, we note that the contracting officer was in fact aware of and sought legal advice concerning Colonel Thompson's participation in this procurement even prior to the Air Force's request for best and final offers. Although the Ethics in Government Act of 1978, as amended, 18 U.S.C. § 207 (Supp. III, 1979), restricts the activities of former Government employees in their dealings with their former agencies, communications for the purpose of furnishing scientific or technological information are exempt from these restrictions. 18 U.S.C. § 207(f); 5 C.F.R. § 737.15. Air Force legal officers concluded that Colonel Thompson's involvement fell within the technical information exemption and advised the contracting officer that Colonel Thompson's participation did not preclude consideration of Techplan's proposal.

The question of whether Colonel Thompson's actions violated the Ethics in Government Act of 1978 is for resolution by the Air Force under the regulations issued by the Office of Government Ethics. 5 C.F.R. § 737.1(c)(6) (1981). Our interest, within the confines of a protest, is limited to determining whether Colonel Thompson's action may have resulted in prejudice or bias on behalf of Techplan--without regard to whether or not his participation violated the act. In this regard, we note particularly that JLA has offered no evidence whatsoever to bolster its conjecture that Colonel Thompson attempted to influence the outcome of the award decision and, similarly, has provided no evidence of bias in the evaluation. Unsupported allegations do not satisfy the protester's burden of proof. PSI Associates, Inc., B-200839, May 19, 1981, 81-1 CPD 382; Plant Facilities and Engineering, Inc., B-201618, April 22, 1981, 81-1 CPD 310. In these circumstances, and absent any evidence that Colonel Thompson's limited involvement undermined the integrity of the competition, we find no basis to question the Air Force's actions.

contract; that is, the Air Force made it clear that it was acquiring a contractor to perform specified services with however many staff the contractor elected to use, rather than purchasing the services of a particular number of people. In this context, we view the paragraph in the negotiations letter which JLA considers misleading, quoted above, as advisory rather than directory, particularly in view of the Air Force's qualification of its projection of staff needs as an "initial estimate." JLA responded by increasing its proposed staffing; Techplan elected to demonstrate that it could perform the required services with only a limited change in its proposed staffing by using exceptionally well-qualified personnel. Neither approach was prohibited.

We think the option is virtually always available to respond to advice of a purported deficiency in a technical proposal with a showing that the job could in fact be accomplished with the resources originally proposed. JLA had the same option as Techplan, to demonstrate it could perform the required services as proposed, but chose to increase its staff. While this election worked to JLA's disadvantage, we can only attribute this to JLA's failure to accurately assess the options available to it in formulating its response.

(3) JLA's conflict of interest allegations are based on Techplan's use of a Colonel Thomas Thompson, USAF (retired), as a consultant. Colonel Thompson is a former commanding officer of the Tactical Air Forces Interoperability Group (TAFIG), the particular Air Force unit which would be using the services purchased under this solicitation. JLA asserts that Colonel Thompson's participation in this procurement violated the conflict of interest restrictions and that the Air Force failed to properly investigate this allegation. JLA expresses its belief that Colonel Thompson exercised his influence at TAFIG on behalf of Techplan and points to Colonel Thompson's participation in a debriefing by Techplan while he was still commanding officer of TAFIG as further evidence of a conflict of interest.

Techplan states that Colonel Thompson was retained for 2 days to provide technical information on TAFIG's conduct of its "tri-service interoperability responsibilities" and argues that this was consistent with Techplan's existing contracts with the Navy. Both the

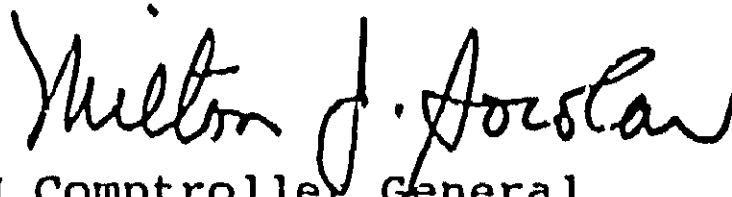
(4) JLA's related contentions that Techplan violated the Service Contract Act of 1965, supra, and engaged in "wage busting" are in fact objections to the Air Force's acceptance of Techplan's proposed, and eventually actual, salaries for certain employees who use microprocessors (very small computers) to enter data into the data base. JLA, the incumbent, classified these personnel as "computer operators" and paid them at a higher rate than Techplan proposed to pay them. Techplan classified these same positions as "keypunch operators" for which a lower rate of pay is permitted under the act. The Air Force considers these positions to be "computer aides" and concedes it does not know whether they should be classified as keypunch operators or as computer operators. Techplan eventually hired some of JLA's employees at rates of pay lower than they had received from JLA--but higher than had been proposed by Techplan.

The practice of proposing to hire and actually hiring a predecessor contractor's employees at reduced wages and fringe benefits in order to be the low bidder on a Government service contract is referred to as "wage busting." Under the Service Contract Act, a successor contractor is bound by the predecessor contractor's compensation levels only where they are established by a collective-bargaining agreement. Furthermore, a successor contractor is not engaging in wage busting when the employees are reclassified to lower paying jobs with different responsibilities. Since JLA did not have a collective-bargaining agreement with its employees and since Techplan did reclassify these employees from computer operators to keypunch personnel, a lower-paying job category, neither Techplan nor the Air Force were bound by JLA's wage scales. Compare Joule Technical Corporation, 58 Comp. Gen. 550 (1979), 79-1 CPD 364.

The Department of Labor is the agency primarily responsible for the administration of the Service Contract Act. We agree with the Air Force that questions concerning the classification of these employees and whether their salaries are in compliance with the act are for that Department. Consequently, we will not consider these allegations.

(5) We will not consider JLA's final allegation. It appears from the record that after the selection of Techplan but prior to award of the contract, an Air Force employee identified several of JLA's better workers to Techplan. The Air Force advises that the impropriety of this action has been pointed out to the employee who provided this information to Techplan and assures us that this event will not be repeated. Since the offending event occurred after the Air Force had already selected Techplan, it did not affect the selection of the awardee. Consequently, we regard the question to be academic and will not consider it. Dataproducts New England, Inc., et al., B-199024, January 9, 1981, 81-1 CPD 116.

JLA's protest is denied in part and dismissed in part.



Acting Comptroller General
of the United States